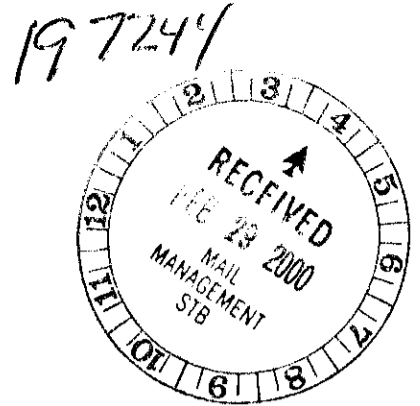




DONELAN CLEARY  
WOOD & MASER, P.C.

February 29, 2000



Via Hand Delivery

The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

*Handwritten signature*  
FEB 29 2000  
Post of  
FEB 29 2000

Re: STB Ex Parte No. 582, *Public Views on Major Rail Consolidations*

Dear Secretary Williams:

Please find enclosed for filing in the above-referenced proceeding an executed original and ten (10) copies of the Comments of The Fertilizer Institute. Also enclosed is a 3.5-inch diskette containing a WordPerfect 7.0 formatted copy of this filing. An extra copy of the filing is enclosed for stamping and return to our office.

Should you have any questions concerning this filing, please do not hesitate to contact the undersigned. Thank you for your cooperation and assistance in this matter.

Respectfully submitted,

*Nicholas J. DiMichael*  
Nicholas J. DiMichael

*Enclosures*

ATTORNEYS AND COUNSELORS AT LAW

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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Ex Parte 582

PUBLIC VIEWS ON MAJOR RAIL CONSOLIDATIONS

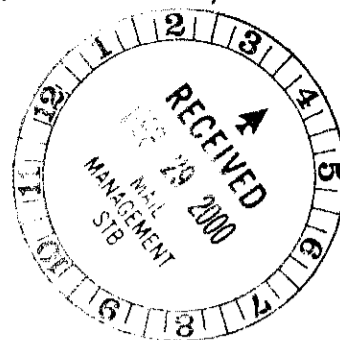
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COMMENTS

submitted by

**THE FERTILIZER INSTITUTE**

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FEB 29 2000

Dept of  
Public Record

The Fertilizer Institute ("TFI") respectfully submits these comments in response to the order of the Surface Transportation Board served February 17, 2000. TFI commends the Board on its initiative in this proceeding. TFI believes that the rail industry is at an important crossroads, and a thorough examination by government policymakers regarding the consolidation of the rail industry is clearly in order. Thus, TFI welcomes this opportunity to submit its views regarding key considerations that the Board and other policymakers should evaluate in future major rail consolidations.

I. Identity and Interest of The Fertilizer Institute

The Fertilizer Institute is the national trade association of the fertilizer industry. The Institute, which traces its roots back to 1883, represents more than 250 member companies, including virtually every primary plant food producer, as well as secondary and micronutrient manufacturers, fertilizer distributors and retail dealerships, equipment suppliers and engineering construction firms, brokers and traders, and a wide variety of other companies and individuals involved in agriculture. Many members of TFI utilize rail transportation, and thus have a vital interest in this proceeding.

## II. Recent Rail Mergers Have Raised Serious Concerns for Fertilizer Shippers

In 1980, the year of the passage of the Staggers Act, there were over 40 Class I railroads. As late as 1994, the Association of American Railroads listed 13 Class I carriers -- a significant reduction from the number that existed in 1980, but still a substantial number of competitors in the rail marketplace. But by the end of 1999, just five major Class I rail carriers held the vast preponderance of track miles, traffic, and revenue; and a merger of two of these remaining five carriers has now been proposed.

Rail mergers since 1995 have raised serious concerns for fertilizer shippers, in two major areas: competition and service. In the area of competition, the consolidation of the nation's rail carriers have meant that fertilizer shippers now have significantly fewer competitive choices than they did just a few years ago, as neutral rail routings have been eliminated, gateways have been closed, and carriers have taken other steps to insure that traffic is forced to remain on the merged carrier's lines. Moreover, the combination of smaller carriers into larger ones has meant that the remaining rail carriers are likely to control a number of sources of a particular commodity, and/or of the destinations to which a commodity might flow. This means that even the potential for geographic or product competition (which had never been a perfect substitute for direct rail to rail competition) has been significantly reduced.

The difficulties with rail service after recent mergers needs no detailed discussion. The merger of the Burlington Northern and the Santa Fe in 1995 was accompanied by significant, though not well-publicized, service difficulties. The merger of the Union Pacific and Southern Pacific in 1996 led to an almost-catastrophic meltdown of rail service in the western United States, a service crisis that lasted for over a year, and whose effects lasted well beyond that time. More recently, the purchase and split of Consolidated Rail Corporation by the Norfolk Southern and CSX Transportation has

resulted in well-publicized service failures by both carriers, which seriously affected fertilizer shippers. With these service failures has come the failure, at least to date, of one of the central rationales for these mergers: the promise of better, faster, and more efficient service for shippers compared to service on the pre-merged carriers.

Flowing from these service failures has been the failure of two other central merger rationales – the promise of a rail system that is more competitive with trucks; and systems that are more financially secure. At a recent public meeting of the Conrail Transaction Council, for example, a carrier representative noted that the two eastern carriers were now transporting about five percent fewer carloads than Conrail carried pre-merger. In other words, instead of taking trucks from the highways, that merger to date has led to the additional diversion of trucks to the highways. And the weakened financial condition of the nation's rail carriers is reflected in their heavy debt load and particularly in their stock price, which, as a recent Journal of Commerce article notes, are frequently trading at approximately half of their 52-week highs.<sup>1</sup>

III. It is Likely That Additional Rail Mergers Within the Remaining Class I Carriers Will Lead to Still Further Consolidations

It appears to TFI that one clear lesson to be learned from this merger activity since 1995 is that a rail merger cannot be looked at in isolation. TFI strongly commends the Board, therefore, for its recent decision in the CN/BNSF merger proceeding, in which it

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<sup>1</sup> Journal of Commerce, February 16, 2000, p. 8 ("Psst! You want to buy a railroad? Cheap?"). The article, by respected transportation analyst Lawrence H. Kaufman, notes that CSX was selling for less than half of its 52-week high; NS was down 60% from that level; BNSF was down nearly 44%; and UP was down 45%. CN was down "only" 32% from its 52-week high.

indicated that it would look at so-called “cumulative impacts and crossover effects” of the proposed BNSF/CN merger.<sup>2</sup>

History clearly teaches that a merger of one railroad with another is evaluated by other railroad competitors in strategic terms. While railroads have sometimes toyed with such strategic responses as marketing alliances or operational coordination agreements, the eventual strategic response has inevitably taken the form of still another merger. Particularly given the current consolidated state of the rail industry, a merger by any two major existing rail carriers would vault those parties over all of the other participants in the industry in terms of size, scope and market reach. Thus, it is clear that a merger by two of the remaining five major Class I carriers will inevitably lead to still further consolidations, perhaps down to as few as two systems serving Canada and the U.S.

Thus, in evaluating any rail merger that comes before it, the Board has to evaluate not only that merger and its effect upon competition and traffic flows, but the likely strategic response of the remaining industry participants, and the effect of additional mergers on rail service and competition in the United States.

#### IV. The Board Should Be Cautious In Evaluating The Claimed Benefits of Mergers

Since 1995, the filing of a merger application has been accompanied by a blitz of major proportions, both within the Board’s application process and outside of it, touting the benefits of the merger. Almost without exception, claims of better, more reliable, faster rail service and lower rates compared to the pre-merger state of affairs have to date proven to be wrong. The Board’s decisions approving these mergers, and reviewing the results of past mergers, have often accepted these claims with little critical analysis.

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<sup>2</sup> See, STB Docket No. 33842, *Canadian National Railway Company, et al Burlington Northern Santa Fe Corporation, et al. – Common Control*, decision served December 28, 1999.

TFI strongly believes that the Board must obtain significantly increased staff resources so that it can be freed from having to depend upon a record built in large part by the rail parties with an extremely strong vested interest (as well as financial resources unmatched by any other party) in convincing the Board that “all is well.”<sup>3</sup> And the Board must cast a far more critical eye on the claims made by the applicants in any merger proceeding brought before it.

V. The Approval of Any Future Consolidation Must Be Accompanied By Significantly Increased Rail-to-Rail Competition, and Must Address Concerns About Service

TFI believes that even the current structure of the rail industry requires increased rail-to-rail competition. Thus, it goes without saying that any further rail consolidations must be accompanied by significantly increased rail-to-rail competition.

This should take a number of forms. In the most general area, the Board’s overall policies with respect to rail carriers should give a heightened emphasis to both preserving *and encouraging greater* rail to rail competition. More specifically, significantly-increased rail-to-rail competition should include the right to rates over points where traffic is or could be feasibly interchanged (*i.e.*, the unrestricted right to bottleneck rates); and should provide for the offering of contracts over bottleneck segments.

The provision of rates over bottleneck segments would permit economic access and competition over the consolidating carriers’ lines, without adversely affecting rail operations or rail safety, since the carrier owning the tracks would still be the carrier operating over the tracks. The offering of bottleneck contracts by the merging carriers

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<sup>3</sup> In other agencies, for example the Federal Energy Regulatory Commission, designated agency staff takes a direct role in the proceeding before the agency.

would (under the recently judicially-approved “contract exception”<sup>4</sup>) permit economic access and competition over other, non-merging carriers’ lines in at least some circumstances under present law, so that both merging and non-merging carriers could remain on a level competitive playing field. And significantly-increased competitive access should include the establishment of bottleneck rates even when a carrier can provide complete origin-to-destination service.

Significantly-increased competitive access should also include the right to reciprocal switching within a set distance of a terminal. The Board should seriously reevaluate its extremely restrictive competitive access rules, under which no shipper has ever succeeded in a competitive access case.

Finally, any future rail mergers must address fertilizer shippers’ concerns about rail service. The provision of increased competitive opportunities will in some cases provide service options. For example, the ability of a shipper to route traffic at its choice over any point where traffic is or can be feasibly interchanged could enable some shippers suffering from service deficiencies to quickly exit the lines of the problem carrier, thus uncongesting those lines; or at least provide such shippers some leverage to demand better service by threatening the offending carrier with losing its long haul.

In some cases, however, competitive access will not be enough. For example, during the UP meltdown in 1997, BNSF, which was given trackage rights over certain UP lines to cure competitive problems resulting from the merger, was unable to serve its customers on the trackage rights lines because of the congestion on the UP. Thus, increased competition must also be accompanied by service guarantees. Such service

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<sup>4</sup> See, *Union Pacific Railroad Company v. STB*, No. 98-1058, Feb. 15, 2000 (D.C. Circuit).

guarantees must be specific, and must take a variety of forms, giving shippers the right of quick and easy redress for all of the damages caused by the service problems.

VI. Any Future Rail Consolidations Must Be Accompanied By A Simpler, Faster, and Less Expensive Procedure to Resolve Rate, Service and Other Problems

There is one final, and perhaps most important, point. TFI strongly believes that the current mechanisms for resolving rate, service and other problems between fertilizer shippers and carriers are seriously in need of reform. In an extremely fast-changing fertilizer marketplace, it is simply unacceptable for a rate case to take, at minimum, sixteen months and usually well longer,<sup>5</sup> and for other types of cases to take even longer. While American business is strongly moving toward private methods for quickly resolving commercial disputes, such as mediation and arbitration, rail carriers have never generally consented to arbitration of rate and service disputes as a matter of right.

TFI believes that the Board should seriously examine the feasibility of mandatory arbitration, with strict time limits, as the preferred means of resolving rate and service disputes between fertilizer shippers and rail carriers. An arbitration procedure must include rates and service if it is to be of substantial use. Such a step, TFI believes, would go far toward developing an accessible and usable process for resolving problems in today's business environment.

VIII. Conclusion

TFI appreciates the opportunity to make its views known to the Board, and respectfully requests the Board to consider these comments.

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<sup>5</sup> For a variety of reasons, the Board has never met the now-statutorily-mandated goal of completing a case within nine months of the closing of the record.

Respectfully submitted

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February 29, 2000